Supreme Court, U.S.
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No. 04-___

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

JERRY JOSEPH BOLDUC,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether law enforcement officers conducting a "**Knock** and **talk**" with an individual suspected of marijuana dealing violated the Federal Constitution's Fourth Amendment by allegedly waiting too long after being denied permission to search, where the officers' momentary delay in departing was due to the observation of an unusually large bulge in Respondent's rear pants pocket and an officer conducted a pat down for weapons, where defendant on his own initiative explained that the bulge was $6,500 in cash from a used auto sale and invited and accompanied the officer to his sales lot to verify paper work for the sale, but it did not comport with Respondent's explanation and Respondent on his own initiative admitted marijuana possession and returned to his home with the officer and voluntarily turned over 3.7 pounds of marijuana, and voluntarily signed a consent to search form and later gave a statement disclosing the details of his illegal drug possession.

2. Whether this Court should grant *certiorari* to clarify Fourth Amendment jurisprudence where there appears to be a split of opinion within the United States Courts of Appeal and State Courts concerning legally acceptable parameters of the police investigative procedure commonly referred to as "**Knock** and **talk**."

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Now come the People of Michigan, Petitioner, by David S. Leyton, Prosecuting Attorney in and for the County of Genesee, Michigan, by Donald A. Kuebler, Chief Appellate Counsel, praying a *writ of certiorari* will issue to review the judgment of the Michigan Court of Appeals, in *People v Bolduc*, 263 Mich App 430, 688 NW2d 316 (2004), affirming the 68th District Court's dismissal of an Information charging Respondent with possession with intent to deliver marijuana, contrary to the Michigan Public Health Code, MCL 333.7401(2)(d)(iii) as well an order suppressing 3.7 pounds of marijuana and defendant's incriminating statements relating thereto.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Court of Appeals was released for publication October 28, 2004 and is reported as *People v Bolduc*, 263 Mich App 430; 688 NW2d 316 (2004), *lv. den.* February 28, 2005 in *People v Bolduc*, 472 Mich 868, 692 NW2d 840 (2005). The opinion affirmed the 68th District Court's dismissal of the charged offense of possession with intent to deliver marijuana, contrary to the Michigan Public Health Code, MCL 333.7401(2)(d)(iii), as well an order suppressing 3.7 pounds of marijuana and defendant's statements relating thereto. [Copies of the opinion below and the referenced order denying Petitioner's request for Michigan Supreme Court review are

included in the appendix to this petition, *infra.*, App. 1a-20a.]

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257(a). The Michigan Court of Appeals opinion in this search case rests upon the Federal Constitution and relies on federal law, discussing and citing federal cases almost exclusively. *Ohio v Robinette*, 519 US 33, 117 S Ct 417, 136 L Ed 2d 347 (1996); *Michigan v Long*, 463 US 1032, 103 S Ct 3469, 77 L Ed 2d 1201 (1983).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The constitutional provision involved in this petition is Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONCISE STATEMENT OF THE CASE

The Michigan Court of Appeals opinion was entered on August 24, 2004, released for publication October 28, 2004, following a remand order of the Michigan Supreme Court. *People v Bolduc*, 263 Mich App 430 (2004). [App. 1a-19a]

Respondent Jerry Bolduc was charged in the Genesee County Prosecutor's Information with possession with intent to deliver marijuana, contrary to the Michigan Public Health Code, MCL 333.7401(2)(d)(iii), said offense occurring on Monday, April 16, 2001. [See Information District Court file]

A preliminary examination was conducted in the 68th District Court before Michael D. McAra, J., on June 21, 2001 and August 8, 2001. [Trans. June 21, 2001 and Aug. 8, 2001. – App. 3a]

The Genesee County Sheriff's Drug Enforcement Unit received information that Respondent Jerry Bolduc, a then 58 year old prior convicted felon, was storing marijuana at his home at 627 Freemen St., in the City of Flint.

On Monday, April 16, 2001 at about 7:00 pm, Capt. Compeau went to Respondent's home to investigate the tip by employing the police investigative tool commonly referred to as "**Knock** and **talk**" which has been described as a legitimate method of investigation, designed to obtain a suspect's consent to search. To that end, Compeau asked Respondent about storing marijuana in his house. Defendant did not deny that he kept the marijuana, but when asked for permission to search the home said "No." [App. 3a] As Compeau was about to leave he observed an unusually

large bulge in Respondent's rear pants pocket and asked him what it was. [Tr. 7] On cross-examination Compeau was asked if he did a pat down of Respondent. Compeau said that he was within arms length of Respondent and that he "checked him for any weapons." Although he did not see any weapons he conducted the pat down stating that it was good police procedure for their "safety." [Tr. 30] [App. 3a-4a] As to the large bulge Respondent explained it was a $6,500 cash payment for an auto he sold that day from his used car lot on Fenton Rd. [Tr. 7] On his own initiative Respondent offered to justify the unusually large amount of cash by showing Compeau the paper work kept in a "police book" he was required to keep at the car lot. [Tr. 9] They drove to the lot in Compeau's car. [Tr. 8, 10] [App. 4a] On the way there Respondent volunteered that he had access to someone selling large quantities of marijuana. [Tr. 8] At the car lot, Respondent, much to his chagrin, could not make the $6,500 in cash jibe with the figures in the "police book." Respondent then said he wanted to cooperate with Compeau. Respondent gave no further explanation for the $6,500. [Tr. 6-11] [App. 4a] Respondent thereafter volunteered that he had marijuana at his home and said "I'll get it for you." [Tr. 11] They drove to Respondent's home on Freeman Street. After they entered, Respondent obtained nine bags of marijuana, weighing 3.7 pounds, from a freezer and gave them to Compeau. [Tr. 13, 16] At approximately 8:50 pm Respondent signed a consent to search form and voluntarily gave a non-*Mirandized* tape-recorded statement. [Tr. 12, 13] [App 4a] Respondent volunteered that he had purchased the marijuana a while back for $4,600. [Tr. 17] [App. 4a-5a]

At the conclusion of the preliminary examination 68th District Court Judge Michael D. McAra dismissed the

charge of PWID marijuana following an oral motion by defense attorney Roger Isaac. [Trans. Aug. 8, 2001, pp 5-9] In granting the motion to dismiss, Judge McAra said that after Respondent asked Capt. Compeau to leave, it was improper to ask him about the large bulge in his pants pocket. The Court further found that it was improper to ask Respondent where the money came from and to accompany him to the used car lot. The court said that this scenario was "inherently coercive." The Court said that "when they refused to leave immediately upon being requested to leave that they basically had the status of trespassers and, anything from that point that happened is – tainted and inadmissible." [Tr. 8] [App. 5a, 23a-24a] Other pertinent facts will be set forth in the argument portion of this petition, *infra*.

The Genesee County Circuit Court on the prosecutor's appeal affirmed. [Order of Nov. 5, 2001] [App. 2a]

The Michigan Court of Appeals initially denied Petitioner's application for leave to appeal but the Michigan Supreme Court, in lieu of review, remanded the case to the Michigan Court of Appeals for consideration as on leave granted. *People v Bolduc*, 467 Mich 900, 654 NW2d 330 (2002).

The Michigan Court of Appeals, per Hoekstra, P.J., and Donofrio, J., affirmed the District Court's order of dismissal and suppression, finding that it was unreasonable, and therefore unconstitutional, for the police to prolong a "**Knock** and **talk**" encounter at the home of defendant after he refused to grant permission to search and asked them to leave. The Court said extending the encounter created an inherently coercive atmosphere rendering defendant's turnover of 3.7 pounds of marijuana

and his incriminating statement as being involuntary. [App. 1a-16a]

Dissenting Judge Peter O'Connell would reverse the District Court, finding that the majority opinion that defendant was seized by the police and coerced into admitting storing marijuana at his home and turning it over to the police was not supported by the evidence or the jurisprudence. [App. 16a-19a] On February 28, 2005 the Michigan Supreme Court entered a summary order denying Petitioner's application for leave to appeal. *People v Bolduc*, 472 Mich 868, 692 NW2d 849 (2005) [App. 20a]

The People of Michigan, Petitioner, respectfully request that a *writ of certiorari* will issue, directing the Michigan Court of Appeals to order the 68th District Court to reinstate the charged violation of Public Health Code of Michigan, MCL 333.7401(2)(d)(iii) and to permit the prosecution to introduce as evidence the 3.7 pounds of marijuana turned over to Captain Compeau as well as defendant's statements relating to said offense.

REASONS FOR GRANTING THE WRIT

The case *sub judice* presents this Honorable Court with the opportunity to define permissible police conduct with respect to the investigative procedure commonly referred to as "**Knock** and **talk**."

The Michigan Court of Appeals opinion in this case has established a **bright-line**, "but for" test concerning the "**Knock** and **talk**" police investigative procedure and has decided federal questions and interpreted the Fourth

Amendment in a way that conflicts with decisions of other state courts of last resort or of a United States Courts of Appeals, and conflicts with relevant decisions of this Court. Prior to 1991, no appellate case ever used the phrase "**Knock** and **talk**" in reference to a consent search of a home. Since then, the use of this new shorthand description for a long-established police investigative technic has burst across the United States, not only in police training rooms, but also in judicial opinions. See Swingle & Zoellner, "**Knock** and **talk**" *consent searches: If called by a panther don't anther*, 55 J. Mo. B. 25 (1999).

Westlaw electronic research discloses 115 Federal appellate court and 243 State appellate court decisions involving "**Knock** and **talk**" procedures. The opinion of the Michigan Court of Appeals is not supported by any recent decision of the United States Supreme Court. Moreover, recently decided cases of State Courts and other United States Courts of Appeals, give substantial support to the contention of Petitioner that under the totality of the circumstances of this case, Respondent Bolduc's Fourth Amendment protection against unreasonable searches and seizures was not violated.

QUESTION 1 – ARGUMENT

Standards of Review

The Michigan Court of Appeals' decision following the general rule giving deference to the 68th District Court's factual findings, *People v Farrow*, 461 Mich 20, 208-209, 600 NW2d 634 (1999), is unacceptable in this case.

Appellate courts everywhere review the lower court's findings at a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 32, 691 NW2d 759 (2005). The

reviewing court accepts the lower court's factual findings unless they are clearly erroneous; however, the ultimate determination of Fourth Amendment reasonableness is a question of law that is reviewed *de novo*. *United States v Nichols*, 374 F3d 959, 964 (10th Cir, 2004). Stated another way, the lower court's conclusions as to the lawfulness of searches or seizures generally present mixed questions of law and fact, which are reviewed *de novo*. *United States v Thomas*, 863 F2d 622, 625 (9th Cir. 1998). (mixed questions of law and fact usually require *de novo* review, although the clearly erroneous standard applies if the necessary analysis is predominantly factual in nature). The decisions also state that application of constitutional standards concerning searches and seizures to essentially uncontested facts is entitled to less deference and for that reason reviewing courts conduct *de novo* review of the lower court's ultimate ruling on a motion to suppress. *People v Jenkins*, *supra*, *People v Oliver*, 464 Mich 184, 191-192, 627 NW2d 297 (2001).

Analysis

Petitioner respectfully requests that this Court review the Michigan Court of Appeals determination that the "**Knock** and **talk**" in this case escalated into an illegal seizure of Respondent in violation of the Fourth Amendment, rendering his eventual turn over of 3.7 pounds of marijuana and consent to search and his explanation concerning said possession a nullity.

In its opinion the Michigan Court of Appeals established a **bright-line** rule concerning the "**Knock** and **talk**" encounter as follows:

> In sum, while the police are free to employ the knock and talk procedure, *Frohriep*, *supra*,

> they have no right to remain in a home without consent, absent some other particularized justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person's home following the person's request that they do so, absent a legal basis for the police to remain without the person's consent. [App. 15a-16a]

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In assessing the protections created by said amendment, the United States Supreme Court has "long held that the 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio v Robinette*, 519 US 33, 39, 117 S Ct 417, 136 L Ed 2d 347 (1996). Reasonableness is measured by examining the totality of the circumstances. *Id.* Because of "'endless variations in the facts and circumstances'" implicating the Fourth Amendment, reasonableness is a fact-intensive inquiry that does not lend itself to resolution through the application of **bright-line** rules. *Id.*, quoting *Florida v Royer*, 460 US 391, 506, 103 S Ct 1319, 75 L Ed 2d 229 (1983).

The Genesee County Sheriff's Deputies here performed a warrantless **"Knock** and **talk"** investigative technique, a method of investigation requiring the officer to go to a home, knock on the door, and ask questions in an

effort to gain consent to search. "Courts have defined [Knock and talk as 'a non-custodial procedure [in which] the officer identifies himself and asks to talk to the home occupant and eventually requests permission to search the residence.'" *United States v Hardeman*, 36 F Supp 2d 770, 777 (E.D. Mich 1999). (citation omitted). Courts generally have upheld this investigative procedure as a legitimate effort to obtain a suspect's consent to search. *People v Frohriep*, 247 Mich App 692 (2001).

It is now well-settled under the Fourth and Fourteenth Amendments that warrantless searches are *per se* unreasonable, "subject only to a few well-delineated exceptions." *Katz v United States*, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967). One such exception is a search pursuant to consent. *Schneckloth v Bustamonte*, 412 US 218, 219, 93 S Ct 2041, 36 L Ed 2d 854 (1973). However, the consent to a police search must be voluntary. *Id.* at 222, 93 S Ct 2041. Voluntary means the "consent was not the product of duress or coercion, express or implied," which must be determined by looking at the "totality of the circumstances." *Id.* at 227, 93 S Ct 2041. The government must prove this by a preponderance of the evidence. *United States v Saadeh*, 61 F3d 510, 517 (7th Cir. 1995).

To determine whether consent was voluntary or not, the court should consider many factors including "age, education, and intelligence of the defendant; advisement of rights; how long he was detained prior to consent; repeated requests for consent; physical coercion; and whether he was in custody." *United States v LaGrone*, 43 F3d 332, 334 (7th Cir. 1994). See also *United States v Strache,* 202 F3d 980, 985 (7th Cir. 2000) (noting that presence or absence of any one of the factors listed in *LaGrone* is not controlling).

Although the case *sub judice* presents some of the facts which question the voluntariness of Respondent's consent, reviewing all the facts together, this Court should conclude that Respondent's conduct here was voluntary.

Petitioner respectfully submits that review in this case is somewhat complicated by the 68th District Court's and Michigan Court of Appeals' apparently inconsistent legal conclusions.

The unlawful detention inquiry is said to be fact-intensive, and is reviewed for clear error. *United States v Dewitt*, 946 F3d 1497, 1502 (10th Cir. 1991), *cert. denied*, 502 US 1118, 112 S Ct 1233, 117 L Ed 2d 467 (1992). However, "the ultimate issue of whether a seizure occurred is a question of law" which is reviewed *de novo*. *United States v Bloom*, 975 F2d 1447, 1450 (10th Cir. 1992).

The United States Supreme Court reminds us that the Fourth Amendment does not require that police officers employ the "least intrusive means" of conducting their investigations. *Bd. of Educ. v Earls*, 536 US 822, 837, 122 S Ct 2559, 153 L Ed 2d 735 (2002).

The Michigan Court of Appeals perceived its jurisprudential responsibility in this case as requiring that it "further define what is permissible conduct by the police when conducting a knock and talk procedure." [App. 1a] Thus the declaration of a **bright line** rule that **it is unreasonable, and therefore unconstitutional, for the police to prolong a knock and talk encounter at a home where the resident who is the focus of the investigation,** [Respondent herein] **has refused to grant permission to search and has directed the police to leave**. [App. 2a] The majority opinion puffs the Michigan Court of Appeals' assessment of the knock and

talk strategy, taking what was once not inherently unreasonable, and something that has been clearly recognized as legitimate, but ignores police officer safety. [App. 2a]

Notably, Respondent Bolduc did not testify at the preliminary examination, thus there is no testimony contradicting Capt. Compeau's testimony regarding Respondent's consent. [App. 3a]

Petitioner further maintains that the 68th District Court Judge and the Michigan Court of Appeals should have evaluated the circumstances as they would have appeared to prudent, cautious and trained officers. *United States v Rhiger*, 315 F3d 1283, 1288 (10th Cir. 2003).

Petitioner maintains Capt. Compeau's brief inquiry concerning the bulge in Respondent's pocket was legitimate. Here Respondent's explanation, albeit untruthful, was in response to a question that falls within the "public safety exception" to the *Miranda* rule. See *New York v Quarles*, 467 US 649, 104 S Ct 2626, 81 L Ed 2d 550 (1984). The public safety exception applies when "there is an objectively reasonable need to protect the police or the public from any immediate danger associated with [a] weapon." *United States v Mobley*, 40 F3d 688, 693 (4th Cir. 1994) (quoting *Quarles*, 467 US at 659, n 8, 104 S Ct 2626)

In *Terry v Ohio*, 392 US 1 (1968) this Court stated: "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 15 (citation and internal quotation marks omitted). The test is an objective, rather than a subjective, one. See

Id. ("[T]he test for the existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.") (citation and internal quotation marks omitted). Police questioning, alone, is not tantamount to the requisite restraint on liberty. See *Id.* at 15-16 ("Our inquiry is not directed at whether the police conduct objectively communicated police desire to *speak* to Cardoza, or ask him a *question*. Rather, we must determine whether their conduct indicated that they were interfering with his *liberty* to such an extent that he was not free to leave.") (emphasis in original) (footnote omitted); See also., e.g., *Florida v Bostick,* 501 US 429, 434, 111 S Ct 282, 225 L Ed 2d 389 (1991) ("Since *Terry*, we have repeatedly held that mere police questioning does not constitute a seizure.)

Because illegal drug distribution is likely to involve weapons, *cf.*, *Terry* (determining that a robbery is likely to involve weapon) Petitioner submits that under the facts of this case Capt. Compeau was acting reasonably in making inquiry about the bulge in Respondent's rear pants pocket.

Contrary to the Michigan Court of Appeals' characterization of the knock and talk encounter at issue, Petitioner maintains that the Monday, 7:00 pm, April 16, 2001 encounter between Respondent and Capt. Compeau was low-key and cooperative. No weapons were drawn by accompanying Sheriff's Deputies and there were no barking commands. Apart from the brief encounter, it did not have the earmarks of a seizure. See, e.g., *US v Cannizzaro*, 2005 WL 757884 (D.Me.)

Under the decisions however, a pat-down search, even in the form of a brief touch of outer clothing only, is said to

constitute a sufficient restraint on a suspect's liberty to implicate the search and seizure protections of the Fourth Amendment. See e.g., *Richards v Wisconsin*, 520 US 385, 394-95, 117 S Ct 1416, 137 L Ed 2d 615 (1997) (noting that *Terry* requires "a reasonable and articulable suspicion of danger to justify a pat-down search"); *United States v Chhien*, 266 F3d 1, 7 (1st Cir. 2001) (describing a pat-down search as amounting to "a *Terry* stop within a *Terry* stop"); *United States v Davis*, 202 F3d 1060, 1062 (8th Cir. 2000) ("*Terry* leaves no doubt that a pat-down search is a seizure.") (footnote omitted); *United States v Villanueva*, 15 F3d 197, 199 (1st Cir. 1994) (characterizing "a pat-down of even the slightest character" as "a search").

Notwithstanding the above-referenced decisions, Petitioner maintains that the fact that Capt. Compeau conducted a pat-down search, does not in itself retroactively convert the encounter into an investigative *Terry* stop.

There are two types of seizures that have distinct law enforcement justifications. During an investigative stop, the officer may briefly detain a person while the officer investigates his reasonable suspicion that criminal activity is afoot. On the other hand, a pat-down search, protects the officer's personal safety while dealing with a person he reasonably believes may be armed and presently dangerous. To be constitutionally reasonable, a protective frisk must also be based upon reasonable suspicion that criminal activity is afoot, therefore pat-down searches normally occur during investigative stops of persons suspected of criminal activity. But the two types of seizures are analytically distinct, as is evidenced by the fact that the Supreme Court in *Terry* upheld the constitutionality of a pat-down search *without considering* whether an investigative stop

preceded the protective frisk. [*United States v Davis*, 202 F3d at 1062]

In the case *sub judice* as in *Davis*, the officer "did nothing to change the consensual nature of the encounter except frisk [the defendant] for weapons. When that momentary seizure ended [the defendant] remained free to answer [the officer's questions or to leave (assuming the search uncovered no weapons.)." *Id.* [FN 9] A separate question remains whether the protective search was justified. Petitioner maintains that it was.

Contrary to the 68th District Court's and Michigan Court of Appeals' decisions, Petitioner maintains that this Court should have no trouble concluding that, in this case, a reasonable person in Respondent's position would have felt free to decline Capt. Compeau's request or otherwise terminate the encounter. In this case Respondent's home on Freeman St. was approached at a reasonable hour of the day, Monday, April 16, 2001 at 7:00 o'clock pm. There is nothing in the record to indicate that Respondent was incapable of interacting with Capt. Compeau. Compeau knocked on Respondent's door, identified himself and announced the purpose of the visit. No show of force was made, no weapons were drawn, and no commands, threats, or otherwise aggressive language was used. [App. 3a-5a]

In the case *sub judice* the Michigan Court of Appeals places special emphasis on the fact that the **"Knock and talk"** took place at Respondent's home. [App. 10a-14a] Location however, is just one factor to be considered for Fourth Amendment purposes. The list of factors is non-exclusive and no one factor is dispositive. *United States v Abdenbi*, 361 F3d 1282, 1291 (10th Cir. 2004).

While the Michigan Court of Appeals is correct in its discussion of the significance of a person's home, [App. 10a-14a] a similar argument was rejected by the Court. *United States v Spence*, 397 F3d 1280 (10th Cir. 2005). The court, citing *United States v Little*, 18 F3d 1499, 1505 (10th Cir. 1994), said that the privacy expectation of the home "has limited relevance to the question of whether a reasonable person would believe that he or she is unable to terminate the encounter." (noting that an individual's increased expectation of privacy is primarily relevant to the question of the reasonableness of a police search, not to whether an encounter is consensual.) (quotation omitted). The court also cites *United States v Kim*, 27 F3d 947, 953 (3d Cir. 1994) ("As far as consent is concerned, one may consent to an encounter in the privacy of his own home or in a public square.") The court said that it did consider "interaction in a nonpublic place . . . as factors pointing toward a nonconsensual encounter, [citing *Sanchez*, 89 F3d at 718] but said that "[T]he particular location of the encounter, however, is only one factor in the totality of the circumstances test". [Citing *Little*, 18 F3d at 1503.] The court concluded that "[T]here is no *per se* rule that a police encounter within an individual's home is a seizure within the meaning of the Fourth Amendment. See *Abdenbi*, 361 F3d at 1288 ("[I]t is axiomatic that all requests to search a home or apartment are made in nonpublic places.") *United States v Jerez*, 108 F3d 684, 691-92 (7th Cir. 1997) (recognizing that a "**Knock** and **talk**" is ordinarily consensual unless coercive circumstances exist).

The Michigan Court of Appeals' discussion concerning the circumstances surrounding the brief pat-down for weapons is representative of the culture of victimhood and is not acceptable when contrasted with the need to protect

the safety of the police. [App. 4a] The Court of Appeals majority totally ignores Respondent's voluntary effort to dispel the suggestion that the cash was from drug dealing from his home.

Under the decisions, voluntariness is a question of fact to be determined from the totality of the circumstances. *Ohio v Robinette*, 519 US 544-540 (1996). Courts examine a number of factors including: 1) the voluntariness of the defendant's custodial status; 2) the presence of coercive police procedures; 3) the extent and level of the defendant's cooperation with the police; 4) the defendant's awareness of his right to refuse consent; 5) the defendant's education and intelligence; and, 6) the defendant's belief that no evidence will be found. *United States v Hernandez*, 279 F3d 302, 307 (5th Cir. 2002) citing *United States v Jones*, 234 F3d 234, 242 (5th Cir. 2002).

Petitioner maintains that Respondent's own behavior, in the circumstances of this case, underscores the impression that a reasonable person would not have felt compelled to submit to a show of police authority. Respondent was at all times cooperative – voluntarily offering to show Capt. Compeau the paper work to explain the source of the $6,500 cash bulge in his rear pants pocket. While Capt. Compeau did not advise respondent that he was free to terminate the interview at that time, that is not in itself dispositive of the existence of a Fourth Amendment seizure. See e.g., *Trujillo*, 316 F Supp 2d at 117 (fact that officers who encountered defendant near driveway of residence and asked two questions were uniformed and did not advise him he had right to leave did not render encounter a seizure).

While the 68th District Court and Michigan Court of Appeals found otherwise, [App. 1a-16a] Petitioner maintains

that it is unreasonable to hold officers accountable for unforeseen answers to straightforward questions. *United States v Gay,* 774 F2d 368, 379-80 (10th Cir. 1985) See also *Rhode Island v Innis*, 446 US at 301-02, 100 S Ct 1682 ("since police cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response") (emphasis in original).

In *State v McGivern*, 400 A2d 527 (1979) the court said that if a person chooses to disclose contraband or evidence thereof as to which he ordinarily would be protected by virtue of his constitutional rights, without that course being initiated by the police, he does so at his peril. In *McGivenn* the defendant failed to respond to a trooper's question as to whether he had luggage in the vehicle. Instead, he, for some reason known only to himself, chose to open the trunk. Once that occurred, the trooper was free to act on the basis of what his senses revealed. In *Scott v State*, 782 A2d 862 (Md. 2001) the court rejected defendant's illegal search claim stating, "[I]n hindsight, that was a foolish decision, from his point of view, but the issue is not whether the consent was an intelligent one, only whether it was voluntary."

Petitioner maintains that the police should not be held accountable for Respondent's post pat-down effort to dispel his marijuana dealing by trying to explain the $6,500 wad of cash in his pants pocket. Petitioner maintains that there should come a time when a criminal defendant should be required to accept the consequences of his voluntary conduct.

The test of voluntariness is "whether the defendant's will was 'overborne' or his 'capacity for self-determination was critically impaired.'" *United States v Pelton*, 835 F2d 1067, 1071 (4th Cir. 1987) quoting *Schneckloth*, 412 US at 225, 93 S Ct 2041. Significantly however, "[v]oluntariness is not ... 'to be equated with the absolute absence of intimidation,' for under this test virtually no statement would be voluntary." *Pelton* citing *United States v Wertz*, 625 F2d 1128, 1134 (4th Cir. 1980).

The Michigan Court of Appeals holding that Capt. Compeau unconstitutionally extended his stay by taking steps to insure his safety is inconsistent with established Fourth Amendment jurisprudence. Pursuant to *Terry*, the legality of investigatory stops is tested in two parts. First, courts examine whether the action of the officer was justified at its inception, and then make inquiry as to whether subsequent action of the officer was reasonably related in scope to the circumstances that justified the stop. [392 US at 19-20] The Michigan Court of Appeals suggests that the Fourth Amendment required Capt. Compeau to leave immediately after Respondent denied the request to search, notwithstanding the possibility that the bulge was a weapon. [Tr. 7] [App. 15a-16a] Petitioner submits that this approach misunderstands the Supreme Court's insistence on reasonableness rather than prescriptions for police conduct under the Fourth Amendment. Petitioner maintains that the correct analysis requires the court to consider the facts and circumstances of each case, giving due regard to the experience and training of the law enforcement officers, to determine whether the actions taken by the officers, including the length of the detention, were reasonable under the circumstances. *Ohio v Robinette*, 519 US 33, 39, 117 S Ct 417, 421, 136 L Ed 2d

347 (1996). Reasonableness requires a balancing of the public interest with an individual's right to be free from arbitrary intrusions by law enforcement. *Pennsylvania v Mimms*, 434 US 106, 109, 98 S Ct 335, 54 L Ed 2d 331 (1977). Reasonableness, measured "in objective terms by examining the totality of the circumstances," "exchew[s] bright-line rules, instead emphasizing the fact-specific nature of the inquiry." *Robinette*, 519 US at 39, 117 S Ct at 417. The Supreme Court has emphazied that the courts must allow law enforcement "officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v Arvizu*, 534 US 266, 273, 122 S Ct 744, 759-51, 151 L Ed 2d 7409 (2002).

Under the second prong of *Terry,* the question to be answered by this Honorable Court is whether Capt. Compeau's actions, after being denied his request to search were reasonably related to the circumstance giving rise to the brief action of a pat down that followed the inquiry about the suspicious bulge. This is because a detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, unless further reasonable suspicion, supported by articulable facts, emerges. *United States v Dorch,* 199 F3d 193, 200 (5th Cir. 1999); *United States v Machuca-Barrere*, 261 F3d 425, 434 (5th Cir. 2001).

In the case *sub judice* Capt. Compeau's question about the bulge and pat down were brief and lasted no longer than necessary, probably no longer than a few moments. It was defendant's voluntary post-pat down conduct that resulted in his turnover of the marijuana and his admissions in relation thereto that led to the charge in this case.

Petitioner maintains that the 68th District Court Judge was not competent to probe the psyche of Respondent Bolduc who sat through the preliminary examination without testifying in support of his suppression motion. Accordingly, the Michigan Court of Appeals' decision erroneously concluded as did the 68th District Court Judge, that failure of the police to immediately leave defendant's home was "inherently coercive", thus causing him to incriminate himself. The Court of Appeals' argument that Compeau's extended stay was improper because it represented his subjective intention to not go away "until I get the information I want" is without legal significance. [Tr. 7] In *Robinette, supra*, the Court explains that the subjective intentions of an officer do not make a continued detention of a respondent illegal under the Fourth Amendment. [App. 3a, 5a, 12a]

Petitioner further submits that the Court of Appeals "but for" test as a basis for affirming the District Court is unacceptable. The Court of Appeals found that:

> " . . . Defendant's conduct of apparent cooperation by answering the question and offering to accompany Compeau to his car lot was the product of the seizure of his person that resulted from the failure of the police to depart from his residence, and ultimately led to the retrieval of the marijuana and defendant making self incriminating statements. Because this evidence ensued from the police officers' improper conduct in failing to leave when requested, they were properly suppressed as the fruit of the illegal seizure when the police officers failed to leave the house when requested by defendant . . . " [Tr. 8] [App. 15a]

Contrary to the Court of Appeals' holding, the United States Supreme Court has said, "the fact of custody alone has never been enough in itself to demonstrate a coerced

confession or consent." *United States v. Watson*, 423 US 411, 424, 96 S Ct 820, 46 L Ed 2d 598 (1976). See also, *State v. Blade*, 107 P3d 775 (Wash App 2005), holding freedom of movement, not the atmosphere or psychological state of defendant, is the determining factor in deciding whether an interview is custodial. Accordingly, a claim of psychological compulsion alone does not compel a finding that the defendant was in custody for *Miranda* purposes.

Petitioner submits that causal connection alone, is not sufficient to require suppression. Better reasoned decisions such as *State v Rodriguez*, 854 P2d 399 (Or. 1993) reject the so-called "but for" test, which would require the suppression of any evidence that would not have been discovered "but for" the unlawful police conduct. In the case *sub judice* the alleged illegality, the failure to depart immediately itself, did not produce any evidence the officer exploited. The alleged illegality (the brief stay) merely put the police in the position to ask about the bulge and the existence of a weapon. The cases of *State v Peppard*, 40 P3d 563 (Or. 2002) (on remand) and *State v Arabzadeh*, 986 P2d 736 (Or. 1999) involved alleged unlawful continuations of lawful traffic stops. After initial investigations were completed, the drivers were told they were free to leave. Thereafter, the officers asked for consent to search. The Court held that, even assuming that the continuation of the stops was unlawful, the evidence gained after consensual searches was admissible if the officer did not "exploit any prior unlawful conduct," "trad(e) on the arrest or otherwise tak[e] advantage of it to obtain the consent." *Peppard, supra*.

Petitioner submits that under the rationale of *Rodriquez, supra*, Respondent's turn over of the 3.7 pounds of marijuana and the his written consent to search, was not the result of the exploitation of unlawful police

conduct. Accordingly, there was no violation of Respondent's Fourth Amendment rights. This Court should reach the same conclusion and thus find that the Michigan Court of Appeals improperly upheld the 68th District Court's order of dismissal and suppression.

Dissenting Court of Appeals Judge Peter O'Connell properly analyzes this case and correctly concludes that action of the police was proper and that Respondent's " . . . invitation to enter the home, his response to the chief's question, his agreement to accompany the officers to his dealership, and most importantly, his confession to the crime charged, were all unforced and voluntary actions. Because the majority finds otherwise by reading nonexistent facts into this scant record, I must dissent."

Compare also 9 ALR 3d 858, **Search – Consent While in Custody** (1966) where the author cites cases in section [h] where courts have found consent to have been given voluntarily while the accused is under arrest, even though he attempted to mislead or evade the police. In section [II] several cases are cited where an arrested person consents to a search, being under the mistaken impression that no contraband is present, the courts have found such consent voluntarily given; there would be no reason for the defendant not to consent readily, for an unfruitful search would tend to allay any suspicion and work to his own advantage. Likewise, consent given by one who knows that contraband is present, but who believes it to be so well concealed as to escape detection or who contends that it will not incriminate him because of a disclaimer of ownership, is also generally thought to be self-serving and not likely to have been coerced.

This Court should be persuaded to grant *certiorari* to the Michigan Court of Appeals.

QUESTION 2 – ARGUMENT

Standards of Review

The "touchstone of Fourth Amendment analysis is reasonableness." *Ohio v Robinette*, 519 US 33, 39, 117 S Ct 417, 421, 136 L Ed 2d 347 (1996).

Analysis

Contrary to United States Supreme Court jurisprudence the Michigan Court of Appeals published opinion establishes a **bright-line, "but for"** test prohibiting police conducting a "**Knock** and **talk**" investigation from extending their stay at a defendant's home on being denied their request to search, unless they have a legal basis to remain. Westlaw electronic research discloses that there are 115 United States Federal Court and 243 State Court decisions involving appellate review of police "**Knock** and **talk**" procedures. This Court has not decided any cases on this important subject. *Certiorari* should be granted to establish the legal parameters of police conduct when officers are engaged in "**Knock** and **talk**" investigations. The Michigan Court of Appeals opinion is too restrictive and compromises police officer safety.

Date: May 27, 2005

Respectfully submitted,

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Appendix for Petitioner

People v Bolduc, 263 Mich App 430 (2004) 1a-19a

68th District Court bench opinion & order of dismissal (Aug. 8, 2001) (excerpt) 20a-23a

People v Bolduc, 472 Mich 868 (2005) 24a

263 Mich. App. 430

Court of Appeals of Michigan.
PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Jerry Joseph BOLDUC, Defendant-Appellee.
Docket No. 244970.

Submitted June 2, 2004, at Lansing.
Decided Aug. 24, 2004, at 9:20 a.m.
Released for Publication Oct. 28, 2004.

Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, Arthur A. Busch, Prosecuting Attorney, Donald A. Kuebler, and John C. Schlinker, Assistant Prosecuting Attorneys, for the people.

Law Office of Roger G. Isaac (by Roger G. Isaac), Flint, for the defendant on appeal.

Before: HOEKSTRA, P.J., and O'CONNELL and DONOFRIO, JJ.

HOEKSTRA, P.J.

This case is before us by order of our Supreme Court, which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v. Bolduc*, 467 Mich. 900, 654 N.W.2d 330 (2002). In this case, we are required to further define what is permissible conduct by the police when conducting a knock and talk procedure.[1] In *People v. Frohriep*, 247 Mich.App.

[1] In general, "the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even

(Continued on following page)

692, 637 N.W.2d 562 (2001), we determined that the knock and talk procedure itself is not unconstitutional, but we also concluded that the knock and talk procedure is subject to judicial review to determine whether the particular circumstances comply with general constitutional protections. *Id.* at 697-698, 637 N.W.2d 562. The case presently before us raises the issue whether it is unreasonable, and therefore unconstitutional, for the police to prolong a knock and talk encounter at a home after the resident who is the focus of the investigation, defendant herein, has refused to grant permission to search and has directed the police to leave. The district court found that under the circumstances of this case the conduct of the police in extending the encounter with defendant was inherently coercive, and thus the district court suppressed evidence of defendant's incriminating statements and the marijuana that defendant turned over to the police. The circuit court affirmed. We conclude that the district court's findings were not clearly erroneous and that the coerciveness of the encounter constituted an unreasonable seizure of defendant's person. Further, the district court properly suppressed defendant's incriminating statements and the marijuana found in defendant's residence and dismissed the case. Accordingly, we affirm the circuit court's order affirming the district court's order of dismissal.

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knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *People v. Frohriep*, 247 Mich.App. 692, 697, 637 N.W.2d 562 (2001).

I. Facts[2] and Procedural History

At the preliminary examination, the prosecution presented only one witness,[3] a police officer, Captain Michael Compeau, who testified as follows. Approximately two weeks before he and another police officer initiated the knock and talk encounter with defendant, Compeau received a tip that defendant was storing marijuana at his residence. On several occasions during the intervening weeks, he conducted surveillance of defendant, but never observed anything that supported the tip. On the date of the incident, April 16, 2001, Compeau, along with four other police officers, went to defendant's residence at approximately 7:00 p.m. to conduct the knock and talk procedure.

At defendant's residence, Compeau and one other officer approached the front door and defendant admitted them into his residence. Just inside the front door, a three to four minute encounter took place between defendant and the officers, with Compeau apparently doing all of the talking for the two officers. Compeau informed defendant, who was initially upset by the presence of the officers, but soon calmed down and became "gentleman[ly]," that they were police officers and that they had received a tip that marijuana was stored at his residence. Although defendant did not deny having marijuana, he "said no" to Compeau's request for permission to search the home. When questioned regarding whether defendant asked them to leave, Compeau responded, "He certainly did,

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[2] Because no trial has occurred in this matter, our recitation of facts is taken from the preliminary examination transcript.

[3] The prosecution also read into the record pertinent portions of the laboratory report on the evidence obtained from defendant.

yes." Compeau further related that "[defendant] put his hands up, and I said don't – don't touch me, [sic] and that's the time we started talking about the money."

Compeau initiated the conversation concerning money after defendant denied the officers consent to search and instructed them to leave both orally and by gesture directed at Compeau's person. The topic of money arose when Compeau asked defendant about the large bulge in defendant's rear pocket. While Compeau could not articulate when he first observed the bulge, he stated that he may have noticed it when he was conducting a pat-down search of defendant's person around the waist area for weapons "to protect myself" and because "[i]t's good police procedure and safety." However, Compeau also stated that nothing from the tip, his surveillance, or defendant's conduct at his residence gave Compeau reason to suspect that defendant would be armed with a weapon.

When Compeau asked defendant what was causing the large bulge in his rear pocket, defendant responded that he had sold a car that day for $6,500 and he offered to take Compeau to his car lot to verify the sale. Defendant rode to the car lot with Compeau and, once there, defendant was unable to verify that he sold a car that day. Eventually, defendant admitted having marijuana and took the officers back to his residence, where he opened his freezer, retrieved nine bags of marijuana that weighed 3.7 pounds, and gave them to the police. Defendant voluntarily went to the police station with Compeau while other officers remained at defendant's house to conduct a more thorough search. While at the station, and without being

advised of his *Miranda*[4] rights, defendant gave a tape-recorded statement[5] and later signed a consent to search form.[6]

Defendant was charged with possession with intent to deliver marijuana, M.C.L. § 333.7401(2)(d)(iii). At the preliminary examination, the district court dismissed the charge, finding that defendant's self-incriminating statements and the marijuana were obtained after police officers improperly failed to leave defendant's house. Specifically, the district court found that defendant denied permission to search and directed the officers both orally and by gesture to leave. Thereafter, by continuing to question defendant about the large bulge in his rear pocket, Compeau's conduct was inherently coercive because he was using an "indirect offer of force" and indicating that he was not leaving until "I get the information I want." Thus, the district court entered an order of dismissal of the charge against defendant.

The prosecution appealed the district court's order of dismissal to the circuit court, which affirmed the district court's order. The prosecution then filed with this Court a delayed application for leave to appeal the circuit court's order. This Court denied the prosecution's application "for lack of merit in the grounds presented." *People v. Bolduc*, unpublished order of the Court of Appeals, entered June 17, 2002 (Docket No. 241103). The prosecution then sought

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[5] Defendant was fingerprinted at the police station before giving the tape-recorded statement.

[6] Compeau testified that during this entire incident, defendant was not under arrest.

leave to appeal in the Supreme Court. As previously stated, in lieu of granting leave to appeal, our Supreme Court issued an order remanding the case to this Court for consideration as on leave granted. 467 Mich. 900, 654 N.W.2d 330.

II. Standard of Review

In *Frohriep, supra* at 702, 637 N.W.2d 562, we stated the standard of review when considering a trial court's ruling on a motion to suppress evidence:

> We review a trial court's findings of fact for clear error, giving deference to the trial court's resolution of factual issues. *People v. Farrow,* 461 Mich. 202, 208-209, 600 N.W.2d 634 (1999), quoting *People v. Burrell,* 417 Mich. 439, 448-449, 339 N.W.2d 403 (1983). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v. Swirles (After Remand),* 218 Mich.App. 133, 136, 553 N.W.2d 357 (1996). We overstep our review function if we substitute our judgment for that of the trial court and make independent findings. *Farrow, supra* at 209, 600 N.W.2d 634. However, we review de novo the trial court's ultimate decision on a motion to suppress. *People v. Williams,* 240 Mich.App. 316, 319, 614 N.W.2d 647 (2000).

III. Law

While this Court held in *Frohriep, supra* at 697-698, 637 N.W.2d 562, that the knock and talk procedure is not unconstitutional per se, we noted that it is not without constitutional implications. Specifically, this Court stated

that "a person's Fourth Amendment right to be free of unreasonable searches and seizures may be implicated where a person, under particular circumstances, does not feel free to leave or where consent to search is coerced." *Id.* at 698, 637 N.W.2d 562.

Both U.S. Const., Am. IV[7] and Const. 1963, art. 1, § 11[8] guarantee the right against unreasonable searches and seizures.[9] See also *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001); *People v. Kazmierczak*, 461 Mich. 411, 417, 605 N.W.2d 667 (2000). In *Frohriep, supra* at 699-700, 637 N.W.2d 562, we explained:

> The Fourth Amendment protects people from unreasonable searches and seizures. *People v.*

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[7] The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[8] Section 11 of article 1 of the Michigan Constitution provides:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

[9] Michigan's constitutional prohibition against unreasonable searches and seizures is to be construed to provide the same protection as that secured by the Fourth Amendment of the United States Constitution, absent compelling reason to impose a different interpretation. *People v. Green*, 260 Mich.App. 392, 396, 677 N.W.2d 363 (2004).

Faucett, 442 Mich. 153, 157-158, 499 N.W.2d 764 (1993). Stated another way, "[t]he lawfulness of a search or seizure depends on its reasonableness." [*People v.*] *Snider*, [239 Mich.App. 393,] 406 [608 N.W.2d 502 (2000)]. Our Supreme Court has explained that "[t]he reasonableness of a Fourth Amendment seizure balances the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference." *Faucett, supra* at 158, 499 N.W.2d 764.

In order for any police procedure to have constitutional search and seizure implications, a search or seizure must have taken place. U.S. Const., Am. IV; Const. 1963, art. 1, § 11; *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.); see also *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion). As the Sixth Circuit Court of Appeals explained, "[t]he safeguards of the Constitution, with respect to police/citizen contact, will vest only after the citizen has been seized." *United States v. Richardson*, 949 F.2d 851, 855 (C.A.6, 1991). The Sixth Circuit Court of Appeals agreed that "'voluntary cooperation of a citizen in response to non-coercive questioning [raises no constitutional issues.]'" *Id.,* quoting *United States v. Morgan*, 936 F.2d 1561, 1566 (C.A.10, 1991). In *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court stated:

Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way

> restrained the liberty of a citizen may we conclude that a "seizure" has occurred.
>
> Accord *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *Mendenhall, supra* at 551-557, 100 S.Ct. 1870.

Generally stated, the test for what constitutes a seizure is whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), quoting *Mendenhall, supra* at 554, 100 S.Ct. 1870 (Stewart, J.); *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *People v. Sasson*, 178 Mich.App. 257, 260-262, 443 N.W.2d 394 (1989). However, in situations where a person would have no desire to leave, such as where the person is seated on a bus, this test is not an accurate measure of the coercive effect of an encounter with police.[10] Rather, "[i]n such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick, supra* at 436, 111 S.Ct. 2382. The *Bostick* Court stated, "[w]e have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.* at 437, 111 S.Ct. 2382, quoting *Chesternut, supra* at 569, 108 S.Ct. 1975; see also *Kaupp v.*

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[10] In *Bostick, supra* at 435, 111 S.Ct. 2382, the United States Supreme Court stated that the state court erred "in focusing on whether Bostick was 'free to leave' rather than on the principle that those words were intended to capture."

Texas, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003); *People v. Bloxson*, 205 Mich.App. 236, 242-244, 517 N.W.2d 563 (1994). The *Bostick* Court summarized:

> We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus. [*Bostick, supra* at 439-440, 111 S.Ct. 2382.]

Here, the knock and talk encounter took place at defendant's home, and a person's home garners special consideration in the law. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). "'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Payton v. New York*, 445 U.S. 573, 585-586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), quoting *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton, supra* at 586, 100 S.Ct. 1371; *People v. Johnson*, 431 Mich. 683, 691-692 n. 5, 431 N.W.2d 825 (1988).

While searches and seizures without warrants are generally unreasonable per se under the Fourth Amendment and Const. 1963, art. 1, § 11, there are several exceptions, including consent. *People v. Borchard-Ruhland*, 460 Mich. 278, 293-294, 597 N.W.2d 1 (1999); *People v. Brzezinski*, 243 Mich.App. 431, 433, 622 N.W.2d 528 (2000). Consent to search must be freely and voluntarily given and is based on an evaluation of the totality of the circumstances. *Borchard-Ruhland, supra* at 294, 597 N.W.2d 1. Consent is not voluntary if it is the result of coercion or duress. *Id.*

IV. Analysis

On appeal, the prosecution claims that "the [c]ircuit [c]ourt erred in affirming the [d]istrict [c]ourt's order of dismissal." In essence, the prosecution's position is that the district court clearly erred in finding that Compeau's questioning of defendant concerning the bulge in his pocket after defendant directed the officers to leave was inherently coercive, and therefore constituted an illegal seizure of defendant's person. We disagree.

Compeau's testimony at the preliminary examination established that two officers confronted defendant at his residence, identified themselves as police officers, and while inside defendant's home informed defendant that they had reason to believe that he was storing marijuana. Defendant responded by denying permission to search and by requesting, both orally and by gesture, that they leave the premises. Compeau ordered defendant to not touch him when defendant gestured toward him, apparently in an effort to get the officers to leave his home. Rather than leave, however, the officers turned their attention to a

large bulge in defendant's rear pocket and asked defendant to explain it. The evidence also reveals that Compeau patted down defendant for weapons even though Compeau had no reason to suspect that defendant was armed with a weapon. Given this evidence, we cannot say that the district court clearly erred in finding that the circumstances, as they existed when the police failed to leave and instead persisted by asking defendant to explain a bulging pocket, were inherently coercive. By failing to leave defendant's home when requested to do so, the police officers suggested that they were in control of the situation and would not accept defendant's exercise of the right to preclude them from further activity at the home.

Further, a "seizure" occurs when a police officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Frohriep, supra* at 700, 637 N.W.2d 562, quoting *Terry, supra* at 20 n. 16, 88 S.Ct. 1868; see also *People v. Lewis,* 251 Mich.App. 58, 68-69, 649 N.W.2d 792 (2002) (person is "'seized' under the Fourth Amendment when a police officer has restrained the person's individual freedom"). At the pivotal moment in the present case, i.e., the point when the police could either leave as requested or defy that request, the police chose the latter course. Compeau admonished defendant not to touch him and then pursued a new line of inquiry with defendant. What message does that send? The district court concluded, and we think rightly so, that this was an "indirect offer of force" indicating that they were not going away until "I get the information I want." A person who is the subject of that tactic in his own home has no recourse. As is well-settled in the context of the law of self-defense, there is no place to retreat to when one is in his own home. See, e.g., *People v. Riddle*, 467 Mich. 116,

120-121, 134-135, 649 N.W.2d 30 (2002).[11] Unlike a street encounter, a person such as defendant does not have the option of testing whether he is actually confined by the police by simply walking away. Where was defendant to go to avoid the intrusion of the police upon his own property? At that point, defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home. And despite his efforts, the message in return was that we are here until we decide to go, which is not until you have answered all our questions. A person in his own home ought not be placed in that situation by police action without being considered seized. In our judgment, the circumstances here leave no doubt that a reasonable

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[11] In *Riddle, supra* at 134-135, 649 N.W.2d 30, our Supreme Court explained:

It is universally accepted that retreat is not a factor in determining whether a defensive killing was necessary when it occurred in the accused's dwelling:

"Regardless of any general theory to retreat as far as practicable before one can justify turning upon his assailant and taking life in self-defense, the law imposes no duty to retreat upon one who, free from fault in bringing on a difficulty, is attacked at or in his or her own dwelling or home. Upon the theory that a man's house is his castle, and that he has a right to protect it and those within it from intrusion or attack, the rule is practically universal that when a person is attacked in his own dwelling he may stand at bay and turn on and kill his assailant if this is apparently necessary to save his own life or to protect himself from great bodily harm. [40 Am. Jur. 2d, § 167, p. 636.]" [Emphasis omitted.]

The rule has been defended as arising from "'an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.'" *People v. Godsey*, 54 Mich.App. 316, 319, 220 N.W.2d 801 (1974) (citations omitted). Moreover, in a very real sense a person's dwelling is his primary place of refuge. Where a person is in his "castle," there is simply *no safer place* to retreat. [Emphasis in original.]

person in defendant's position would have believed that he was not free to go about his home, and moreover, because of the police presence and action in his home, that person essentially lacked the ability to remove them from his home. Considering all the circumstances surrounding the knock and talk encounter, especially the fact that the police were in defendant's home and did not leave despite defendant's request and gesture, the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. Clearly, defendant was not at liberty to ignore the police presence and go about his business. *Bostick, supra.* Consequently, under these circumstances we conclude that the police officers' persistence despite defendant's efforts to terminate the encounter resulted in defendant being seized in violation of his constitutional rights.

However, our analysis does not end here. The remaining question is whether the inherently coercive context in which defendant was seized entitles defendant to the relief of having his incriminating statements and the marijuana suppressed. Defendant's entitlement to relief is compromised by the fact, as the prosecution correctly points out, that defendant exhibited no reluctance to answer Compeau's question concerning the bulge in his pocket, quickly offered to verify his answer by taking Compeau to his car lot, was not formally placed under arrest and made his incriminating statements to the police at the car lot, and voluntarily returned with the police and turned over to the police the marijuana in his freezer. Thus, the events that actually incriminated defendant took place at a point in time that was much later than the events that transpired at his home during the initial knock and talk encounter

and, in part, at a different location. Moreover, all the incriminating events occurred during a period when there was no indication of a formal arrest or any subsequent coercive conduct by the police. Nevertheless, we conclude that defendant is entitled to the suppression of his incriminating statements and the marijuana. Defendant's conduct of apparent cooperation by answering the question and offering to accompany Compeau to his car lot was the product of the seizure of his person that resulted from the failure of the police to depart from his residence, and ultimately led to the retrieval of the marijuana and defendant making self-incriminating statements. Because this evidence ensued from the police officers' improper conduct in failing to leave when requested, they were properly suppressed as the fruit of the illegal seizure when the police officers failed to leave the house as requested by defendant. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (suppression of unlawfully obtained evidence required when unlawful seizure not sufficiently attenuated or purged); *People v. Cartwright*, 454 Mich. 550, 557-558, 563 N.W.2d 208 (1997) (remedy for violation of the Fourth Amendment right against unreasonable searches and seizures is suppression of the unlawfully obtained evidence).

V. Conclusion

In sum, while the police are free to employ the knock and talk procedure, *Frohriep, supra*, they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person's house following the person's request that they do so, absent a legal basis for the police

to remain without the person's consent. Accordingly, we affirm the circuit court's order affirming the district court's dismissal of this case.

Affirmed.

DONOFRIO, J., concurred.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. For a Fourth Amendment violation to occur, defendant must be either physically or constructively seized.[1] No seizure occurred here, because defendant felt free to break off his contact with the police and ask them to leave his home – in fact he initially did so. The majority concludes that a three to four minute conversation with defendant concerning a bulge of money in defendant's pocket[2] amounted to a seizure of defendant's person. I disagree. I would reverse the lower court's decision.

Because defendant allowed the police into his home and initially offered to participate in their investigation, defendant was not seized. *People v. Shankle*, 227 Mich.App. 690, 693, 577 N.W.2d 471 (1998). Nor did the

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[1] I agree with the majority that police officers may not use the "knock and talk" procedure to bulldog a confession out of someone who merely complies with a request to speak with officers in his home. However, I disagree with the majority that the facts of this case reflect such an improper effort by police.

[2] The bulge in defendant's pocket was $6,500 in cash. Much of the officers' discussion with defendant concerned defendant's spurious explanation for carrying $6,500 in cash in his pocket. In my opinion, any reasonable police officer would grow suspicious and pursue this avenue of questioning when following up on a tip that the defendant was dealing narcotics.

officers conduct a search of the premises during their initial visit, so the Fourth Amendment's prohibition against unreasonable searches and seizures simply does not apply to the primary issue in this case. *Id.* Moreover, the majority overlooks the essential touchstone for whether the police or prosecutor may use information or consent a suspect provides in a knock and talk scenario – voluntariness. A suspect who voluntarily offers information in response to police questioning is not, by definition, knuckling under to coercive police tactics. It stands to reason that police may properly use any information garnered from a consensual dialogue such as the one the police chief initiated in this case.[3] *Id.*

The record lacks any evidence that police officers refused to leave defendant's home or otherwise threatened to remain there until defendant provided a confession. In fact, the police immediately left the home at defendant's request when he offered to take them to his car dealership. The police chief merely asked one more question after defendant asked the officers to leave and began ushering them to the door, and I can find no legal authority for the proposition that an officer must cease all questioning while leaving a lawfully entered home.[4] I agree that a

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[3] I note that defendant never asked the police officers to stop asking him questions; he only asked them to leave.

[4] The majority's conclusion to the contrary amounts to placing a gag order on officers as soon as a homeowner asks them to leave. The relationship between an effort to eject the officers and their interjection of more questions is tenuous at best. Again, if the officers had refused to leave until they received information or had exerted any other form of coercion, those additional facts would certainly affect my finding that defendant acted voluntarily. However, the timing and other circumstances surrounding this incident exonerate the officers of wrongdoing,

(Continued on following page)

scenario in which an officer persistently questions a suspect while obstinately refusing to leave the suspect's home could qualify as trespassing, an unreasonable seizure of the home, and a coercive tactic worthy of the suppression sanction. MCL 750.552; US Const, Am IV; *Wong Sun v. United States*, 371 U.S. 471, 485-486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). However, none of these classifications applies to this case.

Rather than stand mute or reassert his desire for the officers' departure, defendant voluntarily, albeit dishonestly, answered the one last question the police chief posed. After defendant began the charade of going to his dealership, he did not express any desire to simply return to his house and end his participation with the investigation. In fact, unlike the typical "knock and talk" scenario, the officers left the home without obtaining defendant's consent to search the house or any valuable information that might lead to a warrant. Swingle & Zoellner, *"Knock and talk" consent searches: If called by a panther, don't anther*, 55 J. Mo. B. 25, 26 (1999). Instead, they only gained defendant's consent to further participate in the investigation, which eventually garnered them a voluntary confession. In short, defendant failed to bear his burden of presenting any evidence that the police coerced his confession, or anything else, from him. Rather, defendant's invitation to enter the home, his response to the chief's question, his agreement to accompany the officers to his dealership, and, most importantly, his confession to the

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so the district court erred when it imposed the heavy sanction of suppression. *People v. Goldston*, 470 Mich. 523, 682 N.W.2d 479 (2004).

crime charged,[5] were all unforced and voluntary actions.[6] Because the majority finds otherwise by reading nonexistent facts into this scant record, I must dissent.

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[5] While not essential to my disposition of the case because I would find defendant's responses to the chief voluntary, I must also note that the confession in this case is not "fruit of the poisonous tree." The circumstances between defendant's confession and the chief's questioning in the house were separated by an extended period. Any pressure defendant felt to cooperate because he could not remove the officers from his home ended when he lured them away from the house. Under these circumstances, the link between the original confrontation and the confession was too attenuated to require suppression. *Wong Sun, supra* at 487-488, 83 S.Ct. 407.

[6] I also agree with the majority that defendant probably felt pressure to comply with the officers' requests, but I believe that pressure stemmed from the knowledge that he had hidden several pounds of marijuana a short distance from where the officers stood. While this anxiety over being caught in his wrongdoing undoubtedly clouded defendant's judgment and compelled him to account for his funds and lead the officers away from the house, the source of this compulsion was a pricked conscience, not the state. Therefore, I am convinced that the majority imputes defendant's impulses to the wrong source, and errs in the process.

STATE OF MICHIGAN

IN THE 68TH DISTRICT COURT
FOR THE CITY OF FLINT

PEOPLE OF THE
STATE OF MICHIGAN

-vs- D.C. #01-958FY

JERRY JOSEPH BOLDUC,

Defendant. /

EXCERPT FROM
PRELIMINARY EXAMINATION – VOLUME 11

BEFORE THE HONORABLE MICHAEL D. McARA,
DISTRICT JUDGE

Flint, Michigan – Wednesday, August 8, 2001

68th District Court Bench Opinion and
Order of Dismissal & Supression of Evidence

* * *

[3] Flint, Michigan

Wednesday, August 8, 2001

4:18 o'clock p.m.

THE COURT: Let's see, we're – okay; we'll call 01-958FY. People versus Jerry Bolduc. This matter – testimony was taken at preliminary examination on June 25th, and then the bind over motion adjourned until today's date so the transcript could be prepared and counsel have a chance to review that.

* * *

[5] THE COURT: Okay, in reviewing the transcript of – I didn't look at it either until today, and was doing that while you gentlemen had a chance to discuss it, and I was checking a couple other items. And it does refresh my recollection in terms of how the testimony came out. In the initial direct examination, there's – nothing came up about it, about being asked to leave, but on cross-examination, the officer acknowledged that that did, at one point, come up; that, when there was a request to search, it was denied, that Mr. Bolduc asked the officers [6] to leave and put his hand up as if to make a gesture. I take it – from the testimony, it appears to this Court and I interpret that, having heard the testimony, to have been some sort of gesture of now leave, as if he was going to either in a gesture type of way, ask them to leave or possibly put the hands on to indicate some kind of light physical pressure, push – pushing to leave, but the officer interpreted that the hand may be coming on him and said, "Don't put your hand on me"; and the officer testified then, Captain Compeau testified that, at that point, that he asked about a bulge in the pocket and was told that this was money, according to Com – Captain Compeau's testimony.

And that the conversation continued. I asked the question, when we were discussing this at the conclusion of the testimony and Mr. Isaac was making his arguments, we got into the issue about knock-and-talk, and that it was the prosecutor's position, he basically agreed with my question, that the prosecutor's position is there's nothing wrong about going to a front door and knocking, regardless if there's no probable cause, and asking to talk to someone. There's no problem with going to someone's front door, it's generally no problem; and, that then, excepting the

Captain's testimony that they were invited inside, they were allowed to come inside, [7] that they are basically invitees, and then I asked the question, "What's their status after Mr. Bolduc told them to leave and they don't leave right away?" And the word that came to the Court's mind, as I noted, was trespassers.

I've got I believe a total of – Captain Compeau plus four other officers, five other officers, I believe; I believe it's a total of five or six police officers. Obviously, the testimony is clear that Mr. Bolduc knew them to be police officers. Um, if their weapons weren't visible, they were discernible. One could certainly assume that they would be armed if they're on duty there. And to argue that once a home owner asked officers to leave, they don't leave, but there's a further question, "What's that in your pocket?", um, it appears reasonable that a homeowner at that point would conclude they're not gonna leave just because I asked them to and what can I do to get them to leave.

I find everything that Mr. Bolduc said after that point stems from their failure to honor his request to immediately leave the – at that point, refusal to leave, basically, is an offer, indirect offer of force. I'm not leaving until I get the information I want, and this may be your house, but that's it. I'm not leaving. What's that in your pocket? I guess I better come up with [17] some explanation as to what that is in order to see if I can get them to leave. It's money. Where'd you get the money from? Sale of – come up with the sale of a car. How do I get them out of the house? I'll take them to the dealership. I don't find any of that's voluntary. It's all coercive. It's inherently coercive. No advice of rights; and, at that point – like I said, at that point, when they refused to leave immediately upon being requested to leave, that they basically had the status of

trespassers and, anything from that point that happened, is – is tainted and inadmissible.

I'll suppress all of the evidence obtained, all the statements, all the evidence seized; and, with that evidence suppressed, I'll grant the motion of defense to dismiss. Can I get a dismissal order?

MR. ISAAC: Your Honor, I've prepared –

THE COURT: Oh, got one?

MR. ISAAC: I've prepared an order of dismissal. I

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472 Mich. 868

Supreme Court of Michigan
People
v.
Jerry Joseph Bolduc
NO. 127243. COA No. 244970.

February 28, 2005

Prior Report: 263 Mich.App. 430, 688 N.W.2d 316.

Disposition: On order of the Court, the application for leave to appeal the August 24, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.